STATE OF MICHIGAN

COURT OF APPEALS

ROBERT GRACZYK and KATHRYN GRACZYK, Plaintiffs-Appellees, v CITY OF BAY CITY, Defendant-Appellant.	UNPUBLISHED February 15, 2011 No. 295389 Bay Circuit Court LC No. 08-003871-NO

Before: HOEKSTRA, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Defendant City of Bay City ("the city") appeals as of right the order denying its motion for summary disposition in this trip and fall case brought pursuant to the highway exception to governmental immunity, MCL 691.1402. We reverse and remand for entry of an order granting summary disposition in favor of the city.

On April 2, 2007, plaintiff Robert Graczyk[1] sent a "Notice of Injury and Intent to Make Claim" to the city. The notice identified the date of occurrence as December 11, 2006, and identified the "location of occurrence" as "Northeast corner of Broadway and 21st Street, Bay City, Michigan." The notice identified the nature of the claim as follows: "On December 11, 2006, I was caused to fall on a heaved section of the sidewalk that is located at the northeast corner of Broadway and 21st Street, Bay City, Michigan." The city received the notice on April 4, 2007.

In a letter dated April 5, 2007, Michigan Municipal Risk Management Authority ("MMRMA"), which represents the city in connection with its self-insurance program, sent a letter to plaintiff's attorney requesting "photos and/or measurements of the area of the fall location as it will help us in identifying the area where the fall took place." In a September 11, 2007, letter, plaintiff's attorney responded by providing "four laser photographs[2] indicating the

[1] Use of the singular term "plaintiff" refers to Robert Graczyk.

[2] The photographs were allegedly taken on March 9, 2007.

spot on the sidewalk where the casualty occurred." The letter also indicated that plaintiff "was hauling his trash can along the sidewalk on the side of his house. As he traversed the area shown in the enclosed photographs, he was caused to trip and fall . . ."

Plaintiff filed the present complaint on December 11, 2008. He alleged that on December 11, 2006, he was "using his sidewalk adjacent to 1800 Broadway for the purpose of retrieving his trash container from the location arranged for routine trash pick-up." He further alleged that

> At the above-referenced location, there existed a discontinuity defect in the sidewalk resulting in uneven sidewalk levels greater than two inches, which constituted a dangerous and/or defected [sic] condition in the sidewalk designed for pedestrian travel, and said discontinuity defect caused the Plaintiff to trip and fall with great force and violence, causing the serious injury, damage and losses set forth more fully in the damages section below.

Plaintiff alleged that the city had a common law and statutory duty pursuant to MCL 691.1402 to maintain the sidewalk adjacent to Broadway Street in reasonable repair so that it was reasonably safe and convenient for public travel.

The city answered and raised a number of affirmative defenses to plaintiff's claim, including, *inter alia*, plaintiff's failure to "provide proper notice in full compliance with the provisions of MCL 691.1404" [citing *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007)].

On August 20, 2009, the city filed a motion for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). The city asserted in part that plaintiff's claims were barred by governmental immunity because there was no actual or constructive notice of the claimed defect, MCL 691.1403. The city contended that "City records reflect no complaints concerning the condition of the sidewalk prior to the Plaintiff's accident and no claims of injury related to the sidewalk. The city also asserted that plaintiff's notice failed to identify the "exact location and nature of the defect" as required by MCL 691.1404. Specifically, the city argued that

> The notice mentions the Northeast corner of Broadway and 21st Street and references a "heaved section". However, no particulars are provided with regard to the height differential of the alleged defect or the specific portion of the sidewalk over which Mr. Graczyk allegedly tripped. Therefore, the notice is defective pursuant to *Rowland* and MCL 691.1404.

At the hearing on the motion, the city argued with regard to the notice requirements under MCL 691.1404:

> The last argument, your Honor, is the section 1404, *Rowland* Statutory Notice argument.

> And we recently learned,[3] in addition to the defects that we outlined in our motion, from the testimony of Mr. Graczyk, that this accident occurred on the northwest corner of the intersection in question; the notice specifies the northeast corner.
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> This is clearly in violation of MCL 691.1404.
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> And, as the Supreme Court in *Rowland* has said, the statute must be strictly followed. Prejudice is not an element. And, your Honor, for that additional reason, we believe this case should be dismissed.

In response to the city's argument regarding MCL 691.1404, plaintiff's attorney argued that *Rowland* did not require specificity with regard to each element in the notice within 120 days but, rather, that *Rowland* held only that the strict 120-day notice requirement was constitutional. Plaintiff's attorney asserted that the notice itself was given about 110 days after the fall and that this was all that was required. Plaintiff's attorney acknowledged, however, that the notice was defective. "Was the notice defective? Absolutely. They – the City didn't ask for clarification . . ."

In denying the city's motion for summary disposition, the trial court opinion, in relevant part:

> With regard to the issue of notice, of course, there's no question that the notice was given within 120 days. The question is the sufficiency of the notice.
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> And based upon my reading of the case law, looking at the – the notice and the various and sundry cases that have followed counsel's cited cases that I've looked at anyway, I find that there has been compliance with the 120-day notice. And I will not grant summary disposition on that basis.

The city moved for reconsideration of the trial court's opinion and order on October 21, 2009, with regard to the issue of notice under MCL 691.1404. The city indicated that the undisputed facts revealed that:

> 1. Plaintiff's Notice of Injury and Intent to Make Claim, timely received by the City of Bay City on April 4, 2007, identified the Location of Occurrence as the northeast corner of Broadway and 21st Street, Bay City, Michigan. The Nature of Claim within the same notice identified the same location.

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[3] Plaintiff testified in his August 27, 2009, deposition (which was taken *after* the city filed its motion for summary disposition) that he fell at the north*west* corner of Broadway and *31*st Street in Bay City, Michigan.

> 2. As was noted during oral argument, at his deposition on August 27, 2009, Plaintiff Robert Graczyk testified that the accident actually occurred on the northwest corner of Broadway and 31st Street.
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> 3. This vast discrepancy in location was not corrected in writing within the 120 days provided by MCL 691.1404.

The city argued that plaintiff's notice did not comply with all of the requirements of MCL 691.1404 as required by *Rowland* and, therefore, the city was entitled to summary disposition.

The trial court denied the motion for reconsideration. In a written opinion, the court acknowledged that plaintiff's notice incorrectly stated the location of the occurrence. The court went on to state, however, that

> On August 20, 2009, Defendant filed a motion for Summary Disposition. However, Defendant did not argue in its Motion for Summary Disposition or at the hearing that the Plaintiff's Notice of Injury was deficient because it did not state the correct street.[4]
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> ***
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> In the case at hand, Defendant was provided with photographs of the alleged defective sidewalk. The photographs, which were attached to a September 11, 2007 letter sent to Defendant, depicts [sic] the exact location of Mr. Graczyk's injury.
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> ***
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> After reviewing the circumstances in their totality, this Court finds that Plaintiff's notice in conjunction with the photographs and description provided by Plaintiff complied with the requirements of MCL 691.1404.

The city argues that the trial court erred by denying its motion for summary disposition under MCR 2.116(C)(7) because plaintiff failed to comply with the notice requirements of MCL 691.1404(1) by failing to identify the exact location of the defect that led to plaintiff's injury.

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[4] The trial court's statement is erroneous. As noted previously, the city's motion for summary disposition challenged the sufficiency of the notice on the ground that the notice did not specify the "exact location" of the injury. In between the time the city filed the motion and the hearing on the motion, plaintiff's deposition was taken and it was revealed that the location of the injury in the notice was incorrect. The city argued at the hearing on the motion that it had recently learned that the location of the injury in the notice was *incorrect*.

The trial court's grant or denial of a motion for summary disposition under MCR 2.116(C)(7) is reviewed de novo. *Grimes v Mich Dep't of Transportation*, 475 Mich 72, 76; 715 NW2d 275 (2006). "Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by immunity granted by law. To survive such a motion, the plaintiff must allege facts justifying the application of an exception to governmental immunity." *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001) (citations omitted). "When reviewing a motion for summary disposition under MCR 2.116(C)(7), a court must accept as true the plaintiff's well-pleaded factual allegations and construe them in the plaintiff's favor. The court must look to the pleadings, affidavits, or other documentary evidence to determine whether there is a genuine issue of material fact." *Guerra v Garratt*, 222 Mich App 285, 289; 564 NW2d 121 (1997) (citation omitted). Granting summary disposition is inappropriate "if a material factual dispute exists such that factual development could provide a basis for recovery[.]" *Id.* However, if there are no disputed material facts, "and reasonable minds could not differ on the legal effect of those facts, whether the plaintiff's claim is barred [by governmental immunity] is a question for the court as a matter of law." *Id.* Plaintiff bears the burden of proving the claimed exception to governmental immunity. *Michonski v Detroit*, 162 Mich App 485, 490; 413 NW2d 438 (1987).

"The governmental tort liability act (GTLA) [MCL 691.1401, *et seq.*] broadly shields a governmental agency from tort liability 'if the governmental agency[5] is engaged in the exercise or discharge of a governmental function.'" *Grimes*, 475 Mich at 76-77, quoting MCL 691.1407(1). The act provides several exceptions to governmental immunity, and this case concerns the highway exception. *Id.* at 77. This exception, set forth in MCL 691.1402(1), provides in part:

> [E]ach governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency.

The Michigan Supreme Court ruled that "the immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed." *Nawrocki v Macomb Co Road Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000). "Because [MCL 691.1402(1)] is a narrowly drawn exception to a broad grant of immunity, there must be strict compliance with the conditions and restrictions of the statute. Thus, we are compelled to strictly abide by these statutory conditions and restrictions in deciding" whether summary disposition was appropriate. *Id.* at 158-159 (citation omitted).

A plaintiff pursuing liability under the highway exception must follow the requirements set forth in MCL 691.1404(1), which necessitates that a claimant provide the governmental

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[5] MCL 691.1401(d) defines "governmental agency" as "the state or a political subdivision."

agency with notice of his or her claim. *Plunkett v Dep't of Transportation*, 286 Mich App 168, 176; 779 NW2d 263 (2009). The notice provision, MCL 691.1404, provides:

> As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

Legislative acts requiring serving notice of defective highway conditions serve "(1) to provide the governmental agency with an opportunity to investigate the claim while it is still fresh and (2) to remedy the defect before other persons are injured." *Plunkett v Dep't of Transportation*, 286 Mich App at 176-177. Additionally, in *Barribeau v Detroit*, 147 Mich 119, 125-126; 110 NW 512 (1907), the Supreme Court stated:

> The requirement that a notice be given is not alone for the purpose of affording the officers of the city opportunity for investigation. It is also for the purpose of confining the plaintiff to a particular "venue" of the injury. In determining the sufficiency of the notice, excepting perhaps as to the time of the injury, the whole notice and all of the facts stated therein may be used and be considered to determine whether it reasonably apprises the officer upon whom it is required to be served of the place and the cause of the alleged injury. The nature of the defect stated may aid in locating the place, and the place may be stated with such particularity that a very general statement of the defect (cause of the injury) may be aided. But to be legally sufficient, a notice must contain a description of the place of the accident so definite as to enable the interested parties to identify it from the notice itself. . . .When parol evidence is required to determine both the place and the nature of the defect, a reasonable notice has not been given to the city. (Citations omitted.)

The Supreme Court recently made clear that the plain language of MCL 691.1404 must be enforced, not rough approximations of its provisions. "MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly, . . . it must be enforced as written." *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007). In arriving at this conclusion, the Court opined that, "inasmuch as the Legislature is not even required to provide a defective highway exception to governmental immunity, it surely has the authority to allow such suits only upon compliance with rational notice limits." *Id.* at 212. These pronouncements militate against liberally excusing notice failures. The Supreme Court specifically overruled *Hobbs v Dep't of State Hwys*, 398 Mich 90, 96; 247 NW2d 754 (1976), and *Brown v Manistee Co Rd Comm*, 452 Mich 354, 356-357; 550 NW2d 215 (1996), which engrafted "an 'actual prejudice' requirement into the [notice] statute," requiring the governmental agency to demonstrate actual prejudice in order to bar a plaintiff's claim where the plaintiff's notice failed to comply with the notice requirements. *Id.* at 213-214.

In the present case, the city maintained that plaintiff's notice, while timely filed, was deficient because it failed to specify the exact location of the defect. The *Rowland* majority

addressed the timeliness issue, but declined to address whether the plaintiff's notice was otherwise deficient based on its contents. *Id*. at 204 n 5.

The primary goal when interpreting statutory language "is to discern the intent of the Legislature as expressed in the text of the statute. Where the language is clear and unambiguous, our inquiry ends and we apply the statute as written." *Grimes*, 475 Mich at 76 (citations omitted). "[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). Words and phrases are "construed and understood according to the common and approved usage of the language[.]" MCL 8.3a. "As far as possible, effect should be given to every phrase, clause, and word in the statute. The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999) (citations omitted). When defining words in a statute, this Court must "consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.'" *Id*., quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995). "[A] provision of the law is ambiguous only if it 'irreconcilably conflict[s]' with another provision, [] or when it is *equally* susceptible to more than a single meaning." *Mayor of City of Lansing v Mich Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004), quoting *Klapp v United Ins Group Agency*, 468 Mich 459, 467; 663 NW2d 447 (2003). When a term is defined in the statute, that definition controls; undefined terms are given "their ordinary meanings[,]" and "[a] dictionary may be consulted if necessary." *Haynes v Neshewat*, 477 Mich 29, 36; 729 NW2d 488 (2007).

MCL 691.1404(1) provides that "[a]s a condition to recovery . . . the injured person . . . shall serve a notice . . . . The notice shall specify the exact location and nature of the defect . . . ." The use of the word "shall" indicates that the requirements set forth are mandatory. *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008); *Rowland*, 477 Mich at 250 n 3 (J. Kelly). In *Rowland*, 477 Mich at 217, the Court held that the statute was clear and unambiguous, and that it required "notice to be given as directed, and notice is adequate if it is served within 120 days and otherwise complies with the requirements of the statute, i.e., it specifies the exact location and nature of the defect, the injury sustained, and the names of the witnesses known at the time by the claimant, no matter how much prejudice is *actually suffered*." *Rowland*, 477 Mich at 219. Further, while not precedentially binding, Justice Kelly's concurring and dissenting opinion in *Rowland*, 477 Mich at 250, specifically construed this statute to require that the plaintiff's notice provide both "**(**1) *the exact location of the defect*; (2) *the exact nature of the defect* . . . ." *Id*. at 250 (Kelly, J.) (emphasis added).

Plaintiff's description of the "exact location" of the defect was "the northeast corner of Broadway and 21st Street, Bay City, Michigan." Plaintiff's notice did not attach any photographs of the location of the alleged fall. Nor did the notice identify the location of the fall as the sidewalk adjacent to plaintiff's residence at 1800 Broadway. One day after receiving the notice, MMRMA sent a letter to plaintiff's counsel requesting "photos and/or measurements of the area of the fall location as it will assist us in identifying the area where the fall took place." Plaintiff did not provide the requested information until September 11, 2007, well beyond the 120-day notice period. Not only is the description of the location of the defect in the notice less than exact, in August 2009 it was discovered that the notice inaccurately identified the location of the

defect. Even assuming that the broad description of the defect as "northeast corner of Broadway and 21st Street" would be sufficient to constitute an "exact location," such location was incorrect as plaintiff identified the actual location of the defect as "northwest corner of Broadway and 31st Street." The correct location of the defect was not provided until 21 months after the incident. Under these circumstances, it cannot reasonably be stated that plaintiff's notice complied with the content requirements of MCL 691.1404(1); the notice is fatally defective.[6]

Reversed and remanded for entry of an order granting summary disposition in favor of the city. Jurisdiction is not retained.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering

[6] Given our resolution of this issue, we need not consider the remainder of the city's arguments.